

# U.S. Court of Appeals for the Federal Circuit

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JEWELPAK CORP, PLAINTIFF-APPELLANT *v.*  
UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 01-1300

(Decided July 16, 2002)

*Peter J. Fitch*, Fitch, King and Caffentzis, of New York, New York, argued for plaintiff-appellant. With him on the brief was *James Caffentzis*.

*Barbara S. Williams*, Attorney, International Trade Field Office, Department of Justice, of New York, New York, argued for defendant-appellee. With her on the brief were *Robert D. McCallum, Jr.*, Assistant Attorney General; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, Department of Justice, of Washington, DC.

Appealed from: United States Court of International Trade  
*Judge* EVAN J. WALLACH

Before MICHEL, GAJARSA, and DYK, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MICHEL. Dissenting opinion filed by *Circuit Judge* GAJARSA.

MICHEL, *Circuit Judge*.

This appeal involves a decision by the United States Customs Service (“Customs”) to reclassify appellant Jewelpak Corporation’s (“Jewelpak”) so-called “presentation boxes” as “jewelry boxes” under subheading 4202.92.90 of the Harmonized Tariff Schedule of the United States (“HTSUS”). Following a two-day bench trial, the United States Court of International Trade entered judgment for the United States, affirming Customs’ classification. *Jewelpak Corp. v. United States*, 131 F. Supp. 2d 100 (Ct. Int’l Trade 2001) (“*Jewelpak III*”). For reasons explained further below, we affirm.

## I

Jewelpak is an importer of various types of “presentation boxes,” plastic or metal boxes covered with either textile materials or plastic sheeting that are used to ship, store, and display items of jewelry. Under the Tariff Schedule of the United States (“TSUS”), Jewelpak’s boxes were classified as “packaging” according to their component of chief va-

lue. During the late 1980s, however, the Harmonized System Committee (“HSC”) had begun to consider amending the Explanatory Note of the Harmonized Tariff Schedule (“Notes”) to modify the definition of “jewelry boxes” under Heading 4202.<sup>1</sup> When the HTSUS supplanted the TSUS on January 1, 1989, no amendment had been made; accordingly, the boxes at issue and those of similar ilk continued to be classified by Customs as “packaging,” according to the material that provided their essential character, for at least a year.<sup>2</sup> The HSC eventually hammered out an amendment to the Note, redefining “jewelry boxes” as follows:

The term ‘jewellery [*sic* throughout] boxes’ covers not only boxes specially designed for keeping jewellery, but also similar lidded containers of various dimensions (with or without hinges or fasteners) specially shaped or fitted to contain one or more pieces of jewellery and normally lined with textile material, of the type in which articles of jewellery are presented and sold and which are suitable for long-term use.

Amended Explanatory Note to Heading 4202 (emphasis added).

This amendment became effective on January 1, 1990, exactly one year after the effective date of the HTSUS. According to the government, from 1990 through 1993, Customs “classified most containers similar to those at issue here as ‘jewelry boxes’ under heading 4202, with only a few exceptions.” Not surprisingly, two of those exceptions were rulings issued to Jewelpak by Customs Headquarters—on January 2, 1990, and July 26, 1991, respectively.

The first, Ruling HQ 086186, was a response to an inquiry from Jewelpak regarding the proper classification of the “presentation boxes” in light of the newly amended Note. Customs concluded that the boxes at issue were not “jewelry boxes” within the nomenclature of the HTSUS because they did not appear to be designed or specially fitted for holding and storing jewelry, and because they did not appear to be suitable for repeated, long-term use. Notably, Customs expressly declined Jewelpak’s invitation to issue a binding ruling on the matter: “Twelve samples were included in your inquiry. A precise description of the materials used in each item was not provided in your letter \* \* \*. Without information as to the component materials of the containers in this case, we are unable to provide a binding ruling as to the classification.”

The second, Ruling HQ 089830, was responsive to yet another request by Jewelpak for a binding classification ruling. This time, however, Jewelpak included a letter providing a breakdown of the boxes’ component materials by weight and by value that was missing before. Customs, de-

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<sup>1</sup> Heading 4202 includes: “Trunks suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, *jewelry boxes*, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly made with paper: Other \* \* \* with outer surface of sheeting of plastic or of textile materials \* \* \*.” (emphases added).

<sup>2</sup> Jewelpak argues that the classification continued until at least May 1991; we need not decide this question, as it does not affect our analysis.

termining that the submitted samples were composite goods that should be classified according to the textile or metal that gave the box its essential character, concluded that the boxes could be imported duty-free. The issue was resolved, but the resolution was fleeting.

By letter dated January 27, 1992, Customs issued notice to Jewelpak that it was considering revoking Rulings HQ 086186 and HQ 089830; it granted Jewelpak a 30-day period within which to submit comments regarding the contemplated revocation. Jewelpak submitted two letters opposing revocation and thereafter met with officials of the Office of Regulations and Rulings to present its case. Unpersuaded, Customs revoked the two earlier rulings and concluded that the presentation boxes were properly classifiable as jewelry boxes subject to a 20% *ad valorem* duty rate. In a thorough, nine-page letter, Customs explained that the Explanatory Notes, “the official interpretation of the tariff system at the international level \* \* \* mak[e] it clear that cases used in the presentation and sale of jewelry are included in the term ‘jewelry boxes’ in heading 4202.” And because the boxes imported by Jewelpak satisfy the definition of “jewelry boxes” in the Amended Explanatory Note to heading 4202, Customs revoked the earlier rulings:

The presentation cases classified in HRL 089830 \* \* \* are classifiable instead under subheading 4202.92.9020, HTSUSA. The duty rate is 20% *ad valorem* \* \* \*. This notice to you should be considered a revocation of HRL’s 086186 and 089830 under 19 CFR 177.9(d)(1). It is not to be applied retroactively to HRL’s 086186 and 089830 (19 CFR 177.9(d)(2)) and will not, therefore, affect past transactions for the importation of your clients’ merchandise under those rulings. However, for the purposes of future transactions in merchandise of this type, these rulings will not be valid precedent.

Ruling HQ 951028, March 3, 1993 at 8. After a July 1993 shipment of the subject merchandise imported by Jewelpak was assessed the duty rate prescribed by HTSUS subheading 4202.92.90, in accordance with Customs’ ruling letter, Jewelpak filed a complaint in the United States Court of International Trade.

## II

Jewelpak asserted three causes of action before the Court of International Trade, and each is pressed again before us. The first cause of action alleged that Customs’ reclassification was improper because the imported merchandise fell outside the common meaning of the term “jewelry box,” which purportedly controls its classification. The second cause of action asserted that because Customs had changed its official position with regard to the meaning of the term “jewelry boxes,” it therefore violated its own regulations—19 C.F.R. § 177.10(c)(2)—by reclassifying Jewelpak’s merchandise without first publishing notice in the Federal Register and providing a notice-and-comment period for interested parties. Finally, the third cause of action alleged that Customs, having at once classified the imported merchandise as packaging even

after the Explanatory Note became effective, was thereafter estopped from altering the duty rate until the President, at the recommendation of the International Trade Commission (“ITC”), made modifications to the previously existing duty rates under 19 U.S.C. § 3005.

The case proceeded in piecemeal fashion. On cross-motions for partial summary judgment as to causes of action two and three, the court granted the government’s motion and denied Jewelpak’s motion on November 27, 1996. *Jewelpak Corp. v. United States*, 950 F. Supp. 343 (Ct. Int’l Trade 1996) (“*Jewelpak I*”). The court rejected Jewelpak’s predicate argument that Customs had an official “position” with respect to jewelry boxes based upon an established and uniform practice, and so the argument that Customs had “changed” positions necessarily failed. *Id.* at 347–48. The court further concluded that Jewelpak was not entitled to summary judgment, even if Customs had changed positions without publication in the Federal Register, because: (1) Jewelpak failed to demonstrate that the change in position had resulted in a restriction or prohibition, as required by 19 C.F.R. § 177.10(c)(2); and (2) in any event, Jewelpak was not prejudiced by the failure to publish because it had *actual* notice of the proposed change. *Id.* at 349–50. Finally, the court rejected Jewelpak’s argument that the subject merchandise could only be reclassified through the action of the International Trade Commission or the President of the United States. *Id.* at 352.

Four years later, the court was again faced with cross-motions for summary judgment, this time regarding the remaining cause of action. Finding the existence of a genuine issue of material fact respecting whether the merchandise at issue was suitable for long-term use, the court denied both motions. *Jewelpak Corp. v. United States*, 97 F. Supp. 2d 1192 (Ct. Int’l Trade 2000) (“*Jewelpak II*”). In particular, the court concluded that summary judgment was inappropriate because the term was subject to more than one meaning, and therefore the common meaning of “jewelry boxes” was unclear:

The term ‘jewelry boxes’ is not defined in the tariff itself \* \* \*. In the dictionaries cited by the parties and others consulted by the court, the term ‘jewelry boxes’ is not defined much beyond a box to hold jewelry \* \* \*. One source has a drawing of a ‘jewel box,’ showing the type usually stored on a dresser and used to hold multiple pieces of fine jewelry. This is the type of box of which [Jewelpak] believes the government’s tariff provision applies. However, one drawing in one source does not outweigh the simple written definition given in numerous sources. Furthermore, this drawing does not imply that boxes which sit on dressers and hold multiple pieces of jewelry are the only type of boxes known as jewelry boxes. Clearly the spectrum ranging from any box that holds jewelry to chests that hold multiple pieces is broad. The common meaning is therefore not clear to the court.

*Id.* at 1195 (internal citations omitted). Therefore, employing the doctrine of *noscitur a sociis*, the court held that whether the merchandise at

issue in this case was properly classifiable as “jewelry boxes” turned on whether it was suitable for long-term use.<sup>3</sup> *Id.* at 1197.

After a two-day bench trial in June 2000 in which experts testified for both sides, the Court of International Trade concluded that the subject merchandise was in fact suitable for long-term use, and entered judgment for the United States accordingly. *Jewelpak III*, 131 F. Supp. 2d at 104. Jewelpak appealed; we have jurisdiction under 28 U.S.C. § 1295(a)(5).

### III

We accord *Skidmore* deference to a Customs tariff classification, affording it a measure of respect commensurate with its power to persuade. *United States v. Mead Corp.*, 533 U.S. 218 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)); see also *Heartland By-Products, Inc. v. United States*, 264 F.3d 1126, 1133 (Fed. Cir. 2001). As Customs’ classifications are presumed correct under 28 U.S.C. § 2639(a)(1), the burden of proving that the classification is erroneous rests on Jewelpak. *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999). We review a simultaneous grant and denial of summary judgment by the Court of International Trade *de novo*. *Russell Stadelman & Co. v. United States*, 242 F.3d 1044, 1048 (Fed. Cir. 2001). And while we determine the meaning to be ascribed to HTSUS terms without deference, we review whether a particular import fits within those terms for clear error. *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1352 (Fed. Cir. 2002).

### IV

Jewelpak essentially raises four arguments before us. First, it asserts that an “established and uniform practice” existed under the TSUS that was carried over to the HTSUS, and therefore Customs was required to publish notice under 19 U.S.C. § 1315 and 19 C.F.R. § 177.10(c)(2) before making any change in that practice. Related to this argument is Jewelpak’s contention that it need not show actual prejudice by Customs’ failure to publish notice in order to prevail. Third, it argues that the trial court erred by using the wrong standard to determine the common meaning of “jewelry box.” Finally, Jewelpak reasserts its argument that action by the ITC and the President was necessary to implement the change in classification of the subject merchandise.

### A

#### 1

At the fore in this appeal is the timing of Customs’ decision to reclassify Jewelpak’s merchandise according to the Amended Explanatory Note to Heading 4202, HTSUS, and whether Customs was required to give

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<sup>3</sup> Literally “it is known from its associates,” the doctrine of *noscitur a sociis* provides that the meaning of questionable or doubtful words or phrases in a statute may be ascertained by reference to the meaning of other words or phrases associated with it. BLACK’S LAW DICTIONARY 1060 (6th ed. 1990). The associated words looked to by the Court of International Trade in this instance were “suitable for long-term use,” which appear in the Amended Explanatory Note to Heading 4202, HTSUS.

notice in the Federal Register. Title 19, Section 1315 of the United States Code governs the effective date of rates of duty for imported articles and, particularly relevant to this appeal, the effective date of administrative rulings that result in higher rates.<sup>4</sup> Jewelpak asserts that an established and uniform practice (“EUP”) existed for the subject merchandise under the TSUS that carried over to the HTSUS and remained in effect until at least May 7, 1991, when Customs issued New York Ruling 862417, which Jewelpak alleges attempted to end the EUP.<sup>5</sup> According to Jewelpak, however, “Customs’ failure to publish notice of that ruling in the Federal Register precludes that ruling from ending the practice \* \* \* which legally continues to this day.” We, like the Court of International Trade, fail to find this argument persuasive.

It is of note that with respect to an “established and uniform practice,” section 1315(d) speaks only in terms of findings made by the Secretary of the Treasury. Our court has also noted the existence of a judicial gloss on the statute that allows a finding of a *de facto* EUP, but the requirements for establishing a *de facto* EUP are stringent and the requirements for extinguishing one are not. See *Heraeus-Amersil, Inc. v. United States*, 795 F.2d 1575 (Fed. Cir. 1986).

The appellant in *Heraeus*, an importer of fused quartz and fused silica, challenged Customs’ decision in 1977 to reclassify the imported merchandise under the TSUS (such that it was subject to a duty rate of 25% *ad valorem*) when, for the previous 10-year period, the same merchandise had always been classified under a separate heading (and subject to a duty rate of 7% *ad valorem*). *Id.* at 1577–78. In objecting to the reclassification, Heraeus asserted (among other things) that the merchandise was subject to an established and uniform practice under § 1315(d). The Court of International Trade held that a *de facto* EUP existed at the lower duty rate despite the Secretary of the Treasury not making a finding to that effect; it noted, however, that in the absence of a finding by the Secretary, a *de facto* EUP could be extinguished merely by the discontinuance of the practice—if the importer had actual notice. See *Heraeus-Amersil v. United States*, 617 F. Supp. 89, 94–95 (Ct. Int’l Trade 1985) (“[T]he court does not endorse plaintiff’s further contention that Customs is bound *ad infinitum* by a now discontinued [EUP] unless Customs publishes notice of the change in classification practice \* \* \*. This result is different from that of the situation in which the importer bases its claimed classification on a finding by the Secretary of the Treasury that an [EUP] existed. Just as an importer’s claim may be based on actual uniform practice, so may the claim be extinguished by the discontinuance of such practice.”).

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<sup>4</sup>“No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise *under an established and uniform practice* shall be effective with respect to articles entered for consumption or withdrawn from a warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling \* \* \*.” 19 U.S.C. § 1315(d) (emphasis added). Thus, according to the terms of the statute, 30-days’ notice is required before an administrative ruling may impose a higher rate of duty on merchandise that is under an established and uniform practice.

<sup>5</sup>New York Ruling 862417 was not issued to Jewelpak, but rather to Unique Packaging Corp., an importer of coin presentation cases from Canada. There is no indication that this ruling was published in the Customs Bulletin.

On appeal, we affirmed that a court may, when faced with sufficient proof, make a judicial determination that a *de facto* EUP existed. We likewise affirmed the trial court's determination that publication in the Federal Register is not the *sine qua non* of extinction of an EUP:

[I]t was not the intent of Congress when it enacted the § 1315(d) notice provision that, where the Secretary (though requested) failed to decide whether an established and uniform practice existed and that determination had to be made by the court, the lack of a published notice in the Federal Register would bar the application of an administrative change in rates even though the affected importer was specifically informed that Customs had changed its practice. The words of § 1315(d)—which related solely to a change in duties found by the Secretary to have been imposed under an [EUP]—do not so provide, and we know of no sufficient reason why Congress would have desired substantially to prolong the use of a formerly-employed rate known by the particular importer to have already been abandoned by Customs (which has not itself acknowledged the existence of that practice).

795 F.2d at 1583. The facts of the present case track those of *Heraeus* quite closely; indeed, when asked at oral argument if the continued vibrancy of *Heraeus* would doom his appeal, counsel for Jewelpak responded affirmatively.<sup>6</sup>

Both parties agree that, insofar as the Secretary of the Treasury issued no ruling on this matter, if an EUP exists at all, it must be a *de facto* EUP. But as in *Heraeus*, the government here denies the existence of an established and uniform practice. That, of course, is not the end of the matter, for if Jewelpak adduced sufficient evidence to the contrary, *compare id.* at 1581–82, the Court of International Trade could so find, even in the face of a blanket denial of an EUP. But no such evidence was adduced and no such finding was made: the Court of International Trade expressly found that Jewelpak had failed to meet its evidentiary burden. *See Jewelpak I*, 950 F. Supp. at 348. Even assuming the existence of an EUP, however, Jewelpak cannot circumvent our decision in *Heraeus*, as counsel readily conceded, because it had actual notice of the proposed change well before it was to be applied to the subject merchandise.<sup>7</sup>

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<sup>6</sup> In light of this admission, we note our significant dismay at counsel's failure to cite *Heraeus* as controlling (or at the very least, persuasive) authority in his opening brief. Although counsel subjectively may have believed that another case was more persuasive, officers of our court have an unfailing duty to bring to our attention the most relevant precedent that bears on the case at hand—both good and bad—of which they are aware. *See generally* Fed. R. Civ. P. 11; *cf. Beaver v. Grand Prix Karting Ass'n, Inc.*, 246 F.3d 905, 911 n.2 (7th Cir. 2001) (admonishing counsel for relying on precedent that had been reversed without so indicating, a "failure [that] can result in sanctions.").

<sup>7</sup> Our decision in *Hemscheidt Corp. v. United States*, 72 F.3d 868 (Fed. Cir. 1995) is not the counterbalance to *Heraeus* that Jewelpak would have us believe. We held in *Hemscheidt* that reclassifications under the HTSUS that nullify established and uniform TSUS classifications are subject to the notice requirements of section 1315(d), unless the reclassification is itself compelled by the terms of the HTSUS statute. *Id.* at 872. Although the present case also involves merchandise classified under a certain subheading of the TSUS that was reclassified some time after the effective date of the HTSUS, the similarities end there: the government and the importer in *Hemscheidt* agreed that an EUP existed under the TSUS, and—more important—Customs changed its classification in *Hemscheidt* after 20 years without any notice whatsoever to the importer. *See id.* at 869, 870.

As previously indicated, Customs notified Jewelpak in January 1992 that it was considering revoking the earlier rulings that classified the subject merchandise as something other than jewelry boxes. Jewelpak responded twice with letters and then met with government officials to discuss the proposed revocation. Over one year after providing the notice of proposed revocation, Customs revoked the earlier rulings in March 1993. In so doing, it limited the revocation to future importations; it did not apply retroactively to merchandise that already had been liquidated. The subject merchandise was liquidated by Jewelpak in July 1993, four months after the revocation ruling and some 18 months after the notice of proposed revocation. Under the circumstances, it flies in the face of reason to suggest that Jewelpak was somehow prejudiced, despite its actual knowledge of the change, by Customs' failure to publish notice of the change. *Cf. Heraeus*, 795 F.2d at 1583 ("If we accepted Heraeus' point that it is entitled to the application of the lower rates until Customs complies with the § 1315(d) notice provision of publication in the Federal Register, Heraeus could receive a windfall because the lower \* \* \* rate would apply to the [post-revocation] merchandise even though Heraeus knew of Customs' change in classification three years earlier.").

Nevertheless, Jewelpak contends that it need not show actual prejudice by reason of the failure to publish because § 1315(d) requires only that it show "prejudice to the importing public in general, and destruction of the uniformity that section recognizes." We disagree, for such a position is without support in the statute and plainly flouts the rule in *Heraeus*, as well as analogous precedents from this and other courts of appeal. *See id.* at 1582; *cf., e.g., Splane v. West*, 216 F.3d 1058 (Fed. Cir. 2000) (holding that a legal opinion issued by the general counsel for the Department of Veterans Affairs was not defective, as applied to petitioner, for failing to comply with the publication requirement of FOIA because petitioner had actual notice of the opinion); *Cargill, Inc. v. United States*, 173 F.3d 323, 332 (5th Cir. 1999) (concluding plaintiffs had suffered no injury in fact and therefore had no standing, despite agency failure to publish a notice of upcoming meetings in the Federal Register, where plaintiffs had actual notice of and attended the meetings); *New York v. Lyng*, 829 F.2d 346, 354 (2d Cir. 1987) (rejecting argument that an agency interpretation was void for violation of APA § 3 for failure to publish in the Federal Register because "the requirement for publication attaches only to matters which if not published would adversely affect a member of the public."). Our decision might well be different, then, had Jewelpak not had actual notice of the change; but as that situ-

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Neither do we find persuasive the dissent's suggestion that *Heraeus* is distinguishable because the actual or constructive notice exception should be limited to *de facto* EUPs established entirely under the HTSUS. *Post* at 11. The scheme under which the practice began—assuming that any practice existed (which we conclude did not in this case)—is in our view irrelevant to determining the adequacy of notice. Where, as here, both the particular importer and the public at large are on notice that Customs has classified merchandise under a particular subheading, an importer cannot claim injury when merchandise falling under that subheading is liquidated at the duty rate set by Customs before the merchandise was even imported; to hold otherwise would grant the importer a windfall and encourage willful ignorance of Customs' classifications. *See Heraeus*, 795 F.2d at 1583.



ation is not before us, we—like the *Heraeus* court, *see* 795 F.2d at 1583 n.14—leave it to be answered on another day.

## 2

We likewise reject Jewelpak’s contention that Customs was required to publish notice under 19 C.F.R. § 177.10 because it allegedly changed “positions” with respect to the subject merchandise. The Department of the Treasury has promulgated regulations requiring the publication of decisions that result in a change of position by Customs:

Before the publication of a ruling which has the effect of changing a position of the Customs Service *and which results in a restriction or prohibition*, notice that the position (or prior ruling on which the position is based) is under review will be published in the Federal Register and interested parties given an opportunity to make written submissions with respect to the correctness of the contemplated changes. This procedure will also be followed when the change of position will result in a holding that an activity is not restricted or prohibited and the Headquarters Office determines that the matter is of sufficient importance to involve the interests of the general public.

19 C.F.R. § 177.10(c)(2) (2001). As emphasized, publication in the Federal Register must be predicated upon a change in position *and* a resulting restriction or prohibition. Jewelpak has failed to persuade us in both regards.

A ruling letter is binding only on the party to whom it is issued, and may be revoked or cancelled at any time. *See* 19 C.F.R. § 177.9(a) (2001). A ruling letter that may have broader applicability, however, may be published in the Customs Bulletin, which we have noted previously is a strong indicium of whether Customs has established a position. *See Superior Wire v. United States*, 867 F.2d 1409, 1413 (Fed. Cir. 1989) (citing *Nat’l Juice Prods. Ass’n v. United States*, 628 F. Supp. 978, 993–94 (Ct. Int’l Trade 1986)). Against this backdrop, we are unmoved by Jewelpak’s assertions that various ruling letters issued between 1988 and 1989 to third parties, and the United States’ initial opposition to the proposed Amended Explanatory Note, constitute a “position” of Customs, a rigorous standard to meet. “Customs’ establishment of a ‘position’ would be along the same lines as that of an [EUP] under 19 U.S.C. § 1315(d)(1982), [and therefore] would require uniform liquidations among the many ports over a period of time.” *Arbor Foods, Inc. v. United States*, 607 F. Supp. 1474, 1478 (Ct. Int’l Trade 1985); *see also Superior Wire*, 867 F.2d at 1413 (citing with approval *Arbor Foods*).

But even assuming that Customs originally had taken a position, we agree with the government that Customs has not so much changed positions with respect to the subject merchandise as it has reexamined the nature of that merchandise and determined that it should be reclassified based upon its suitability for long-term use. *See, e.g.*, Ruling HQ 951028 (“In your submissions, you take the position that these cases do not fall within the definition of jewelry boxes as set forth in the [Explanatory

Notes because] they are not suitable for long-term use \* \* \*. We disagree with your contention that the cases at issue are not suitable for long term use.”); *Jewelpak I*, 950 F. Supp. at 349 (“Customs was free, upon reconsideration, to alter its classification. Customs complied with its regulations and gave notice to Jewelpak, as the ‘person to whom the ruling letters [were] addressed,’ that Customs was considering revocation of the HRLs. This case is simply a revocation of an HRL by Customs.”). And, despite Jewelpak’s protestation, the law is clear that it was wholly appropriate to reference the Amended Explanatory Note (which, in this case, contained the “long-term use” limitation) to help define the proper scope of the tariff term. *See, e.g., Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (“[T]he Explanatory Notes of a tariff subheading \* \* \* do not constitute controlling legislative history but nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings.”); *accord N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001); *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 n.1 (Fed. Cir. 1999).

Jewelpak’s claim that Customs violated 19 C.F.R. § 177.10 also fails because it cannot demonstrate that it was subject to a restriction or prohibition. An increased duty rate, however unsavory to Jewelpak, does not in any way restrict or prohibit it from liquidating the imported merchandise; it must show, for example, that its merchandise would be subject to import quotas or other restraints. True, the Director of the Commercial Rulings Division of the Office of Regulations and Rulings issued a March 1989 memorandum indicating that the then-proposed reclassification “would have severe consequences on the administration of quota restraint agreements.” Those consequences never materialized, however, because importers were granted visa waivers on jewelry boxes under HTSUS Heading 4202 before the goods in question were imported, such that they were not subject to import quotas, quantitative restraints, or other similar import restraints. *See* J.A. 153–57 (Declaration and Supplemental Declaration of Troy H. Cribb, Deputy Assistant Secretary for Textiles, Apparel, and Consumer Goods Industries, U.S. Department of Commerce).

## B

Jewelpak also challenges the Court of International Trade’s determination regarding the common meaning of the tariff term “jewelry box.” According to Jewelpak, the common meaning of a tariff term is fixed as of the date of enactment, and the U.S. Congress—rather than the Customs Cooperation Council or the Harmonized System Committee—retains the sole prerogative thereafter to “expand the scope of a tariff term to include articles not previously included therein.” Here again, Jewelpak has muddled the distinction between changing the meaning of “jewelry box” and determining whether a particular type of box fits within the properly defined scope of “jewelry box.” *See N. Am. Processing Co.*, 236 F.3d at 697 (“Resolution of [whether imported merchandise is properly classified] entails a two-step process: (1) ascertain-

ing the proper meaning of specific terms in the tariff provision; and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed.”).

As the trial court noted, the parties agreed: (1) about the design and material make-up of the boxes, and (2) that the boxes were designed to display jewelry in stores and to hold jewelry for the consumer to take home; the only disagreement was whether the boxes were designed to be reused. *See Jewelpak II*, 97 F. Supp. 2d at 1194. Following the General Rules of Interpretation of the HTSUS and the relevant case law, the trial court looked to its own understanding, to dictionaries, and to other reliable sources to determine the common meaning of “jewelry boxes.” *See id.* at 1195. Recognizing that the Explanatory Notes to the HTSUS were persuasive (but not dispositive) authority on the question of common meaning of tariff terms, *see id.* at 1196, the court concluded that a genuine issue of material fact existed precluding the entry of summary judgment: “Since the boxes do appear to literally fit the dictionary definition of a box that holds jewelry, they are classifiable under subheading 4202. [Yet the] court is unable to reconcile such reasoning with the Explanatory Notes and, more importantly, with the context of the subheading.” *Id.* at 1195. In particular, the court concluded, correctly in our view, that whether the subject merchandise was properly categorized under heading 4202 turned on whether it was suitable for long-term use. At trial, the court heard testimony from at least five witnesses, including three experts, and made findings of fact crediting some witnesses’ testimony and discrediting others. *See Jewelpak III*, 131 F. Supp. 2d at 101–04.

The analysis employed by the Court of International Trade to discern the common meaning of the tariff term “jewelry boxes” was cogent and sound. We hold its conclusions were correct. In addition, Jewelpak has failed to meet its burden and direct our attention to any error, much less clear error, in the court’s finding that the subject merchandise was properly classified under HTSUS subheading 4202.92.90.

### C

We have carefully considered Jewelpak’s remaining arguments—that action by the ITC and the President was necessary, under 19 U.S.C. §§ 3005 and 3006 respectively, to implement the alleged change in classification of the subject merchandise—and find them to be without merit.

### V

We conclude under *Skidmore* that Customs’ tariff classification for the subject boxes is highly persuasive. Moreover, the Court of International Trade’s finding that the subject merchandise is suitable for long-term use is not clearly erroneous, as its finding was based on the credibility assessment of contending witnesses. Finally, we conclude that Jewelpak was not prejudiced by Customs’ failure to publish the revocation letter in the Federal Register because Jewelpak had actual notice of the proposed change and had numerous opportunities to respond.

Accordingly, we affirm in all respects the decision of the Court of International Trade granting judgment for the United States.

**AFFIRMED.**

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GAJARSA, *Circuit Judge*, dissenting.

I respectfully dissent. The panel majority affirms a decision by the United States Court of International Trade allowing the United States Customs Service ("Customs") to reclassify Jewelpak's presentation boxes as "jewelry boxes" under subheading 4202.92.90 of the Harmonized Tariff Schedule of the United States ("HTSUS") and ordering Customs to liquidate that merchandise at a rate of 20 percent *ad valorem*. In my judgment, Customs was required to provide notice by publication in the Federal Register of its decision to reclassify this merchandise under subheading 4202. Section 1315(d) of Title 19 of the United States Code requires publication in the Federal Register of notice of a ruling when, as here, the decision departs from an established and uniform practice ("EUP") and will result in the imposition of a higher tariff rate. Under such circumstances, § 1315(d) provides that the administrative ruling imposing the higher duty rate will be ineffective "prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such a ruling." 19 U.S.C. § 1315(d) (2000). Customs failed to provide the statutorily required public notice. I would therefore reverse and remand for classification of Jewelpak's merchandise at the tariff rate Customs initially assessed.

This court's decision in *Hemscheidt Corp. v. United States*, 72 F.3d 868 (Fed. Cir. 1995), should control the outcome of this case. In *Hemscheidt*, we held that "[r]eclassifications under the HTSUS that nullify established and uniform TSUS classifications are subject to the notice requirements of section 1315(d), unless the reclassification is itself compelled by the terms of the HTSUS statute." 72 F.3d at 871.

Reclassification under the HTSUS that nullified an established and uniform practice, or EUP, that was in place under the former statute, the Tariff Schedule of the United States ["TSUS"], is precisely what occurred with respect to Jewelpak's presentation boxes. Under the TSUS, Jewelpak's boxes were consistently classified as packaging according to their component of chief value. Thus, under *Hemscheidt*, unless the reclassification of Jewelpak's boxes under Heading 4202 was mandated by the HTSUS, Customs was required to provide public notice pursuant to § 1315(d).

The HTSUS did not mandate reclassification of Jewelpak's merchandise as jewelry boxes under Heading 4202. For at least one year after the HTSUS became effective on January 1, 1989, Customs continued consistently to classify boxes such as those at issue as packaging. Under the packaging classification that was in place under the TSUS and for at

least one year under the HTSUS, the duty rate varied from three percent *ad valorem* to zero. It was not until several years later, in 1993, that Customs reclassified Jewelpak's merchandise under Heading 4202, and liquidated it at a rate of twenty percent *ad valorem*. That similar boxes were consistently classified as packaging for at least one year under the HTSUS strongly suggests that the terms of the HTSUS mandated neither the reclassification of Jewelpak's boxes as jewelry boxes under Heading 4202, nor the resulting imposition of the higher duty rate.

An examination of the text and legislative history of the HTSUS confirms that the statute did not mandate this reclassification. The text of the HTSUS and its legislative history fail to define the phrase "jewelry box," and the phrase does not clearly encompass presentation boxes such as those at issue. Rather, as the Court of International Trade noted, the meaning of "jewelry box" is ambiguous. *Jewelpak Corp. v. United States*, 97 F. Supp. 2d 1192, 1195 (Ct. Int'l Trade 2000) ("Clearly the spectrum ranging from any box that holds jewelry to chests that hold multiple pieces is broad. The common meaning is therefore not clear to the Court."). Prior to the amendment to the explanatory notes, which took effect on January 1, 1990, one year after the enactment of the HTSUS, the statutory phrase "jewelry box" was implicitly construed to exclude boxes such as Jewelpak's presentation boxes, which are not sold to consumers for the primary purpose of storing jewelry. At the very least, the statutory text of the HTSUS did not mandate a broader definition. By reinterpreting the meaning of "jewelry box" according to the amended explanatory note, Customs expanded the definition beyond the statutory mandate. According to the amended explanatory note, "jewelry box" means any box that both holds jewelry and is suitable for long-term use.

Although the explanatory notes are not binding, Customs is certainly permitted to consult them. The criterion proffered in the note may be the correct interpretation—or at least, a permissible interpretation—of the phrase "jewelry box." Nevertheless, although the classification of any boxes designed to hold jewelry and suitable for long-term use may be a correct classification, Custom's decision to reclassify Jewelpak's boxes because they met Customs' revised interpretation of the scope of the statutory phrase "jewelry box" was a reclassification under the HTSUS that nullified an established and uniform TSUS classification.<sup>1</sup> Because the reclassification was not compelled by the terms of the HTSUS, the notice requirements of § 1315(d) apply. *See Hemscheidt*, 72 F.3d at 871.

The majority distinguishes *Hemscheidt* on the grounds that in that case, the importer lacked actual notice of the reclassification. It then

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<sup>1</sup> The government disputes the existence of an EUP for the period beginning in 1990, but "[i]t is uncontested that under the [TSUS], the boxes were classified according to their component of chief value." *Jewelpak*, 96-189. The government's arguments regarding the absence of an EUP are directed entirely to liquidations occurring more than one year after the effective date of the HTSUS. The government does not contest that for more than two decades during which the TSUS was in effect, boxes such as those at issue were classified as packaging. As Jewelpak contended in its opening brief, this constitutes an established and uniform practice. The government's failure to argue to the contrary is a concession that Customs had an established and uniform practice under the TSUS. In this respect, this case is identical to *Hemscheidt*.

holds that where the Secretary of the Treasury has failed to issue a ruling, and therefore an EUP exists, if at all, only by *de facto* court recognition, actual notice directed only to the importer of Customs' intent to reclassify the merchandise at issue satisfies the notice requirement of § 1315(d). To support this holding, the majority relies on this court's pre-HTSUS decision in *Heraeus-Amersil, Inc. v. United States*, 795 F.2d 1575 (Fed. Cir. 1986).<sup>2</sup> I would not distinguish *Hemscheidt* on the basis that the importer in that case lacked actual notice, because the court's rationale in *Hemscheidt* was unrelated to the particular importer's actual notice or the putative lack thereof. See 72 F.3d at 872 (stating that common sense and legal sense supported the court's interpretation of § 1315(d) and that "[t]he loss of income to the federal treasury from the 'free levy,' in the large, must be small compared to the price of destruction of established and uniform classification practices upon which predictable international trade depends"). Moreover, *Heraeus-Amersil*, which created the actual notice exception on which the majority relies, is both erroneous, and inapplicable to the present case.

In *Heraeus-Amersil*, this court found that § 1315(d) imposed no requirement of notice in the Federal Register for a reclassification that altered an EUP because the practice at issue had not been recognized as an EUP by the Secretary of the Treasury and because the importer had actual notice of the proposed reclassification. 795 F.2d at 1582–83. The court created an "actual or constructive notice" exception to § 1315(d) for EUPs that exist by *de facto* judicial recognition rather than by a formal finding by the Secretary of the Treasury. In so doing, the court reasoned that:

[I]t was not the intent of Congress when it enacted the § 1315(d) notice provision that, where the Secretary (though requested) failed to decide whether an established and uniform practice existed and that determination had to be made by the court, the lack of a published notice in the Federal Register would bar the application of an administrative change in rates even though the affected importer was specifically informed that Customs had changed its practice. The words of § 1315(d)—which relate solely to a change in duties found by the Secretary to have been imposed under an established and uniform practice—do not so provide, and we know of no sufficient reason why Congress would have desired substantially to prolong use of a formerly-employed rate known by the particular importer to have already been abandoned by Customs (which has not itself acknowledged the existence of that practice).

*Heraeus-Amersil*, 795 F.2d at 1583. The court went on to state that requiring notice in the Federal Register would be improper because the importer "could receive a windfall" because the lower duty rate would

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<sup>2</sup>I share the majority's conviction that counsel, as court officers, must call our attention to precedent of which they are aware when it is so relevant as to be potentially controlling. They must do so even if that precedent is harmful to their position. I am less dismayed than the majority in this case, however, because Jewelpak included *Heraeus-Amersil* in the Table of Authorities in its opening brief, and also mentioned the case on page 15 of its opening brief in the context of admitting that the requirements for showing an established and uniform practice are "stringent."

apply despite the importer's actual knowledge of Customs' reclassification. *Id.*

This reasoning is unpersuasive. Where the Secretary has found an established and uniform practice, § 1315(d) explicitly requires Customs to provide notice in the Federal Register notwithstanding any potential windfall to an importer who possesses actual knowledge of the impending reclassification. Section 1315(d) provides that:

No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption \* \* \* prior to the expiration of *thirty days of publication in the Federal Register of notice of such ruling.*

19 U.S.C. § 1315(d) (2000) (emphasis added). The statute contains no "actual or constructive notice" exception. The resulting potential "windfall" is largely contained, because "if Customs wishes to levy at the increased rate, it is burdened only by the making of a classification according to the rules and giving 30 days notice of its decision." *Hemscheidt*, 72 F.3d at 872. Thus, the resulting burden on Customs, if any, is minimal.

In contrast, there is a substantial benefit to the international trade community from Customs' compliance with the public notice requirement of § 1315(d). The community benefits from the efficient trade that results when the investing community relies on established and uniform practices, knowing that Customs will provide public notice prior to imposing higher duty rates. *See id.* (noting that the purpose of § 1315(d) was to protect reliance interests). The international trade community premises its actions and decisions on the expectation that Customs will conform to its established and uniform practices. Section 1315(d) facilitates such reliance by requiring Customs to provide notice before departing from its EUPs in order to assess higher tariffs. The public notice requirement of § 1315(d) also serves the critical function of promoting uniformity in the duty rates assessed to like goods. This ensures fairness to the importing community.

In *Heraeus-Amersil* the court recognized that these interests are implicated when Customs engages in established and uniform practices, even when the Secretary of the Treasury fails formally to recognize them as such. *Heraeus-Amersil*, 795 F.2d at 1582. This determination was correct. The reliance and fairness interests of the international importing community are implicated by the practices in which Customs uniformly engages. This is so regardless of whether the Secretary formally deems Customs' practice established and uniform. Moreover, the statutory language does not exclude courts from determining that Customs engaged in an EUP where the Secretary should have made such a finding but declined to act in response to a request. *See* 19 U.S.C. § 1315(d) (2000) ("No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury

shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective. \* \* \*"). Thus, the decision in *Heraeus-Amersil* was correct insofar as the court determined that *de facto* EUPs implicate § 1315(d).

In contrast, the reasoning employed by the court in *Heraeus-Amersil* in allowing actual or constructive notice to suffice when Customs departs from a judicially recognized *de facto* EUP is inconsistent with the court's recognition that § 1315(d) may encompass *de facto* EUPs in the first instance. In creating an actual or constructive notice exception for *de facto* EUPs, the *Heraeus-Amersil* decision sacrificed the reliance and fairness interests served by § 1315(d) for the sake of rigid textualism. The court held that, in the event of *de facto* EUPs, actual or constructive notice to the particular importer was sufficient because the statutory text failed to mandate publication in the Federal Register unless the Secretary found an established and uniform practice. *Heraeus-Amersil*, 795 F.2d at 1583. It then stated that it knew of no reason to impose a public notice requirement where the importer had actual notice that Customs was abandoning its previous practice. *Id.* But earlier in the opinion, and despite explicitly noting the reference in the statutory text to a higher duty rate "*than the Secretary of the Treasury shall find to have been applicable to the imported merchandise under an established and uniform practice* \* \* \*," *id.* at 1582, the court stated that:

In enacting [§ 1315(d)], Congress recognized that the importing community relies upon the existence of established and uniform practices in conducting their business. \* \* \* Similarly, *where an established and uniform practice has been judicially found* (because Customs refused to pass on that issue) *to classify particular merchandise under a specific tariff provision, the importing community should be afforded a grace period to permit it to make business decisions in light of any new agency action changing that practice.*

*Id.* (emphases added). The *Heraeus-Amersil* decision was correct to recognize that § 1315(d) applies where the court finds that Customs had an established and uniform practice, even if the Secretary of the Treasury has failed to do so. The court recognized that importers rely on established and uniform practices regardless of the Secretary's willingness to acknowledge them formally, and that § 1315(d) protects this reliance interest. The decision also correctly recognized that the importing community has an interest in receiving public notice.

The *Heraeus-Amersil* decision erred, however, in failing to ensure that Customs provide notice to the entire importing community. Either § 1315(d) applies to *de facto* EUPs or it does not. When it applies, whether by virtue of a *de facto* EUP or one formally recognized by the Secretary, the notice requirement of the statute is triggered. The notice requirement is satisfied only by publication in the Federal Register of the administrative reclassification for at least thirty days prior to the effective date the reclassification. Instead of following its initially sound reasoning to this logical conclusion, the *Heraeus-Amersil* court focused on the lack of textual support for the imposition of a public notice re-



quirement where “the affected importer was specifically informed that Customs had changed its practice.” *Id.* at 1583. Were the question before us in the first instance, I would not have imposed this “actual or constructive notice” exception to § 1315(d). The same reasons that prompted the *Heraeus-Amersil* court to recognize that § 1315(d) encompasses judicially recognized *de facto* established and uniform practices counsel in favor of applying the statute’s public notice requirement. “Actual or constructive notice” is insufficient to protect the interests of the importing community. Section 1315(d) was intended to protect their interests as a community, not merely the interests of a particular importer. The statute admits of a reasonable interpretation that is consistent with this purpose. The court, in *Heraeus-Amersil*, should have held that § 1315(d) requires public notice in the event the court recognizes that Customs intends to depart from an EUP that the Secretary should have recognized but did not.

This panel, of course, cannot overrule *Heraeus-Amersil*, see *Tate Access Floors, Inc. v. Interface Architectural Res., Inc.*, 279 F.3d 1357, 1366, 61 USPQ2d 1647, 1653 (Fed. Cir. 2002) (citing *Vas-Cath Inc. v. Mahurkar*, 935 F.2d 1555, 1563, 19 USPQ2d 1111, 1117 (Fed. Cir. 1991); *Kimberly-Clark Corp. v. Ft. Howard Paper Co.*, 772 F.2d 860, 863, 227 USPQ 36, 37 (Fed. Cir. 1985)); however, *Heraeus-Amersil* is clearly distinguishable. This court decided *Heraeus-Amersil* more than two years before the HTSUS went into effect. The statutory shift is significant because the differences in tariff rates between the TSUS and the HTSUS were supposed to be minimal. The change from the TSUS to the HTSUS was intended to be essentially revenue-neutral. See *President’s Guidelines for Converting the Tariff Schedules of the United States to the Harmonized System*, 46 Fed. Reg. 47897–02, 47897 (Sept. 30, 1981) (instructing Commission to avoid “to the extent practicable and consonant with sound nomenclature principles, changes in the rates of duty on individual products”); H. R. Conf. Rep. No. 100–576, 100th Cong., 2d Sess. 548 (Apr. 20, 1988), available in 1988 USCCAN 1547, 1581 (“The conferees believe that the HTS fairly reflects existing tariff and quota treatment and that the conversion is essentially revenue-neutral.”). In fact, Conversion Reports issued by the International Trade Commission provide a strong indication that the transition from the TSUS to the HTSUS was intended to be revenue-neutral with respect to the particular merchandise at issue. See, e.g., U.S.I.T.C., *Conversion of the Tariff Schedules of the United States Annotated Into the Nomenclature Structure of the Harmonized System*, Rep. on Investigation No. 332–131 Under § 332 of the Tariff Act of 1930, Annex II: Cross-Reference From Present TSUSA to Converted Tariff Schedule (June 1983) (showing all goods previously classified under TSUS Item 640.30.10, duty free, reclassified under Heading 7310, duty free, not under Heading 4202).

Ensuring that the HTSUS remains revenue neutral is more than a “sufficient reason why Congress would have desired substantially to prolong use of a formerly-employed rate known by the particular im-

porter to have already been abandoned by Customs” absent compliance with the public notice requirement of § 1315(d), that the court found absent in *Heraeus-Amersil*.<sup>1</sup> I would therefore limit the actual or constructive notice exception to those *de facto* established and uniform practices that were established entirely under the HTSUS, not to those that were in place under the TSUS. The enactment of a new statutory regime, the HTSUS, that Congress intended to be essentially revenue neutral, provides a strong rationale for adhering to the rule announced in *Hemscheidt*, namely, that “[r]eclassifications under the HTSUS that nullify established and uniform TSUS classifications are subject to the notice requirements of section 1315(d), unless the reclassification is itself compelled by the terms of the HTSUS statute.” 72 F.3d at 871. Section 1315(d) requires notice by publication in the Federal Register; actual notice to the particular importer is insufficient to satisfy the requirements of the statute.

Under the TSUS, Jewelpak’s presentation boxes were consistently classified as packaging according to their component of chief value, and were imported at substantially lower duty rates. Customs’ reclassification of Jewelpak’s boxes as “jewelry boxes” under Heading 4202 was not mandated by the terms of the HTSUS. That reclassification resulted in a higher duty rate, which Customs imposed without providing 30 days of prior public notice in the Federal Register. Customs violated § 1315(d) by so doing. Because Customs failed to provide public notice in the Federal Register for thirty days, this reclassification, and the accompanying imposition of the twenty percent duty rate, should have been ineffective. I therefore respectfully dissent.

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DUFERCO STEEL, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE, AND BETHLEHEM STEEL CORP AND U.S. STEEL GROUP, A UNIT OF USX CORPORATION (NOW KNOWN AS UNITED STATES STEEL LLC), DEFENDANTS-APPELLEES

Appeal No. 01-1443

(Decided July 12, 2002)

*Vincent Bowen*, White & Case, LLP, of Washington, DC, argued for plaintiff-appellant. With him on the brief were *Walter J. Spak* and *Christopher M. Curran*.

*John N. Maher*, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee United States. On the brief were *Robert D. McCallum, Jr.*, Assistant Attorney General; *David M. Cohen*, Director; and *Velta A. Melnbrensis*, Assistant Director. Of counsel on the brief were *John D. McInerney*, Chief Counsel for Import Administration; *Berniece A. Browne*, Senior Counsel; and *Emily Lawson*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC. Of counsel was *Lucius B. Lau*, Attorney, Commercial Litigation Branch, Department of Justice, of Washington, DC.

*Rory F. Quirk*, Dewey Ballantine LLP, of Washington, DC, argued for defendants-appellees Bethlehem Steel Corporation, et al. With him on the brief were *Bradford L. Ward*; *Michael H. Stein*; and *Navin Joneja*. Of counsel was *Jennifer Danner Riccardi*.

Appealed from: United States Court of International Trade  
Chief Judge GREGORY W. CARMAN

Before RADER, SCHALL, and DYK, *Circuit Judges*.

DYK, *Circuit Judge*.

This case presents questions concerning the interpretation of the Department of Commerce (“Commerce”) 1993 orders resulting from anti-dumping and countervailing duty proceedings. Duferco Steel, Inc. (“Duferco”), an importer of carbon steel floor plate produced in Belgium, appeals from the United States Court of International Trade decision holding that its imported floor plate with “patterns in relief [*i.e.*, raised figures at regular intervals that provide a skid-resistant surface] derived directly from rolling” was within the scope of the 1993 anti-dumping and countervailing duty orders (“1993 final orders” or “scope orders”) regarding cut-to-length carbon steel floor plate. *Duferco Steel, Inc. v. United States*, 146 F. Supp. 2d 913 (Ct. Int’l Trade 2001). There is no claim in the 1999 final scope ruling that the language of the 1993 final orders can be interpreted to include appellant’s product. However, Commerce concluded that its 1993 final orders covered the product because the petitions that initiated the investigation included appellant’s product within the scope of the requested investigation, and no language in the 1993 final orders explicitly stated that carbon steel plate with “patterns in relief” was excluded from the scope of the orders, as had been done with respect to universal mill plates. The Court of International Trade affirmed.

We hold that Commerce’s approach is inconsistent with fundamental principles of administrative law and with our own earlier decisions. Scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it. Because Commerce made no claim in the 1999 final scope ruling under review that the scope orders here contain such language, we reverse the decision of the Court of International Trade.

#### BACKGROUND

Generally, “American industries may petition for relief from imports that are sold in the United States at less than fair value (‘dumped’), or which benefit from subsidies provided by foreign governments.” *Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1368 (Fed. Cir. 2002) (citing 19 U.S.C. § 1675b (2000)).

Commerce determines whether there have been sales at less than fair value, 19 U.S.C. § 1673(1) (2000), or whether a subsidy has been provided, *id.* § 1671(a)(1); whereas, the International Trade Commission (“ITC”) determines whether the imported merchandise materially injures or threatens to materially injure the pertinent domestic industry, *id.* §§ 1673d(b)(1), 1671d(b)(1). If both inquiries are answered in the affirmative, Commerce issues the relevant antidumping and countervail-

ing duty orders. *Id.* §§ 1673d(c)(2), 1671d(c)(2); I Bruce E. Clubb, *United States Foreign Trade Law* §§ 21.19, 20.25 (1991).

An antidumping investigation is typically initiated by a petition filed by a domestic industry requesting that Commerce conduct an investigation into possible dumping. The petition initially determines the scope of the investigation. Section 1673a(b)(1) of Title 19 provides that the “petition may be amended at such time, and upon such conditions, as [Commerce] and the [ITC] may permit.” 19 U.S.C. § 1673a(b)(1) (2000). Commerce has “inherent power to establish the parameters of the investigation,” so that it would not “be tied to an initial scope definition that \* \* \* may not make sense in light of the information available to [Commerce] or subsequently obtained in the investigation.” *Cellular Mobile Telephones and Subassemblies From Japan; Final Determination of Sales at Less Than Fair Value*, 50 Fed. Reg. 45,447, 45,449 (Oct. 31, 1985).

Commerce makes an initial determination as to whether the petition “contains information \* \* \* supporting the allegations.” 19 U.S.C. § 1673a(c)(1)(A)(i) (2000). Then Commerce must make a preliminary determination “of whether there is a reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold, at less than fair value.” *Id.* § 1673b(b)(1)(A). This is followed by a final determination “of whether the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value.” *Id.* § 1673d(a)(1). The term “subject merchandise” is defined as “the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, [or] an order \* \* \*.” *Id.* § 1677(25). As noted above, the ITC makes a determination as to material injury or threat of material injury to the domestic industry.

After the issuance of the final antidumping order, *id.* § 1673d(c)(2), questions may arise concerning its scope. The regulations provide procedures for determining whether “a particular product is included within the scope of an \* \* \* order \* \* \*.” 19 C.F.R. § 351.225(a) (2001). A countervailing duty investigation follows a generally parallel procedure, but focuses on whether there is any material injury from benefits provided by foreign governments to foreign exporters. *See, e.g.*, 19 U.S.C. §§ 1671(a), 1671a, 1671b, 1671d (2000). The orders in question here are the product of such antidumping and countervailing duty proceedings.

On June 30, 1992, Bethlehem Steel Corporation (“Bethlehem”), along with other members of the domestic steel industry, filed petitions with Commerce and the ITC asking that antidumping and countervailing duties be imposed on cut-to-length carbon steel plate from Belgium. Bethlehem and the other domestic steel producers claimed that such imported merchandise was being sold and was likely to be sold at less than fair value and that foreign governments were providing subsidies to foreign exporters, which, in turn, caused “material injury” to the domestic producers. The petitions generally described the scope of the requested

investigations and the subject merchandise as covering “cut-to-length carbon steel plate,” which is one class of flat-rolled carbon steel products. To further describe the scope of the requested investigations, the petitions in a footnote made reference to the definition of “flat-rolled products” provided by the Harmonized Tariff Schedule of the United States (“HTSUS”), Chapter 72, Note 1(k). The pertinent language of Note 1(k) defined “flat-rolled products” as “[r]olled products of *solid rectangular (other than square) cross section*,” and stated that “[f]lat-rolled products include *those with patterns in relief derived directly from rolling* (for example, grooves, ribs, checkers, tears, buttons, lozenges) and those which have been perforated, corrugated or polished, provided that they do not thereby assume the character of articles or products of other headings.” HTSUS, Chapter 72, Note 1(k) (emphases added). The petitions also described the merchandise in terms of the width and thickness of the flat-rolled products.

In July 1992, Commerce and the ITC initiated the investigations.<sup>1</sup> In initiating the investigations, Commerce described “Certain Cut-to-Length Carbon Steel Plate” as including

hot-rolled carbon steel *universal mill plates (i.e., flat-rolled products rolled on four faces \* \* \* without patterns in relief) of solid rectangular (other than square) cross section \* \* \** and certain hot-rolled carbon steel flat products in straight lengths, of solid rectangular (other than square) cross section \* \* \*.

*Notices of Initiation*, 57 Fed. Reg. at 33,492; 57 Fed. Reg. at 32,973 (emphases added). In August 1992, Commerce also set forth “proposed [product] matching criteria” that helped interested parties identify the merchandise covered by the petitions in addition to allowing parties to object to any of the identified criteria. One of the criteria specified by Commerce to describe the subject merchandise was “whether checkered or not.” The parties do not dispute that “checkered” refers to “raised patterns in relief.” Moreover, none of the interested parties to whom the product matching criteria were sent objected to using this criterion to identify the subject merchandise.

On November 25, 1992, prompted by a foreign manufacturer’s inquiry as to whether its products with bevelled edges were within the scope of the investigations, the petitioners amended their petitions. The amended petitions included “carbon steel flat rolled products *which have bevelled edges* or other surface or edge characteristics *which might*

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<sup>1</sup> *Initiation of Antidumping Duty Investigations and Postponement of Preliminary Determinations: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate from Various Countries*, 57 Fed. Reg. 33,488 (July 29, 1992); see also *Initiation of Countervailing Duty Investigations and Postponement of Preliminary Determinations: Certain Steel Products from Austria, Belgium, Brazil, France, Germany, Italy, Korea, Mexico, New Zealand, Spain, Sweden, Taiwan, and the United Kingdom*, 57 Fed. Reg. 32,970 (July 24, 1992) (collectively, “*Notices of Initiation*”).

render their cross section other than rectangular \* \* \*.”<sup>2</sup> (emphases added).

On January 25, 1993, Commerce published a decision memorandum, which, *inter alia*, addressed whether the scope of the investigation should be broadened to encompass products with a nonrectangular cross section. Although Commerce “recogniz[ed] that heretofore these products have not been subject to these investigations,” Commerce “nevertheless recommend[ed] accepting petitioners’ clarification that flat-rolled products of nonrectangular cross-section are covered by these investigations \* \* \*.”<sup>3</sup>

After completion of its preliminary investigation, Commerce found that “certain cut-to-length carbon steel plate \* \* \* from Belgium [is] being, or [is] likely to be, sold in the United States at less than fair value \* \* \*.”<sup>4</sup> Commerce also concluded that “benefits which constitute subsidies within the meaning of the [countervailing duty statute] are being provided to manufacturers, producers, or exporters in Belgium of certain steel products.”<sup>5</sup>

In July 1993, Commerce published its final scope determinations associated with the antidumping and countervailing duty investigations, reiterating the conclusions that it had drawn in its preliminary determinations.<sup>6</sup> The *Final AD Determination* regarding steel products from Belgium incorporated by reference Appendix I of the final Argentine antidumping duty determination to define the scope of the 1993 final order, stating that “[t]he full description of the subject merchandise is included in Appendix I to the Final Determination of Sales at Less than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina (Argentine Final) \* \* \*.” *Final AD Determination*, 58 Fed. Reg. at 37,084.<sup>7</sup>

The *Final CVD Determination* regarding steel products from Belgium similarly incorporated by reference the scope appendix of the final Austrian countervailing duty determination. 58 Fed. Reg. at 37,274. Although both the *Final AD Determination* and the *Final CVD Determination* incorporate scope appendices from different countries, both appendices use the same language to describe their respective sco-

<sup>2</sup> Letter from Dewey Ballantine and Skadden, Arps, Slate, Meagher & Flom, to Barbara Franklin, Secretary of Commerce, and Paul Bardos, Acting Secretary of the U.S. International Trade Commission, at 10 (Nov. 25, 1992) (“*Scope Amendment*”).

<sup>3</sup> Decision Memorandum from Roland MacDonald, Director of Office of Agreements Compliance, to Joseph A. Speitri, Deputy Assistant Secretary for Compliance, and Richard W. Moreland, Acting Deputy Assistant Secretary for Investigations, at 10 (Jan. 25, 1993).

<sup>4</sup> Notice of Preliminary Determinations of Sales at Less than Fair Value and Postponement of Final Determinations: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate from Belgium, 58 Fed. Reg. 7,075 (Feb. 4, 1993) (“*Preliminary AD Determination*”).

<sup>5</sup> Preliminary Affirmative Countervailing Duty Determinations and Alignment of Final Countervailing Duty Determinations With Final Antidumping Duty Determinations: Certain Steel Products from Belgium, 57 Fed. Reg. 57,750 (Dec. 7, 1992) (“*Preliminary CVD Determination*”).

<sup>6</sup> See Final Determination of Sales at Less than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate from Belgium, 58 Fed. Reg. 37,083 (July 9, 1993) (“*Final AD Determination*”); Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Belgium, 58 Fed. Reg. 37,273 (July 9, 1993) (“*Final CVD Determination*”).

<sup>7</sup> See also Notice of Final Determination of Sales at Less than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Argentina, 58 Fed. Reg. 37,062 (July 9, 1993) (“*Final Argentine Determination*”).

pes. For ease of reference, we consider only the language set forth in Appendix I of the Argentine order.

Appendix I of the *Final Argentine Determination* is entitled “Scope of the Investigations.” 58 Fed. Reg. at 37,063. Appendix I identified four categories of flat-rolled steel products that were covered by the investigations, including “Certain Cut-to-Length Carbon Steel Plate.” *Id.* at 37,064. Appendix I referred to HTSUS item numbers, but explained that “our written descriptions of the scope of these proceedings are dispositive.” *Id.* at 37,063.

Notably, Appendix I specifically stated that “[i]ncluded in these investigations are *flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (i.e., products which have been ‘worked after rolling’)*—for example, products which have been bevelled or rounded at the edges.” *Id.* at 37,064 (emphasis added). Thereafter, Appendix I stated that “*absent a specific exclusion* of any other products from the written description of the scope, all other products covered in the [HTSUS] items cited in the petitions are included within the scope, including products of nonrectangular cross-section.” *Id.* at 37,069 (emphasis added).

Significantly, Commerce further noted in Appendix I that since the preliminary determination “the Department has addressed the following scope issues.” *Id.* at 37,064. Under the heading “Products of Nonrectangular Cross-Section” and the subheading “Department’s Position,” Commerce stated that “[i]n contrast to the petitions’ explicit exclusion of products of nonrectangular shape, nowhere do the petitions specifically exclude nonrectangular cross-section products from the scope of the investigations.” *Id.* at 37,068. However, Commerce also interpreted petitioners’ 1992 scope amendment:

We believe that, having relied on HTSUS item numbers as a distinguishing factor, petitioners intended to limit their [scope amendment] to flat-rolled products whose nonrectangular cross-sections have been imparted onto the steel after the rolling process, *i.e.*, to products which have been “worked after rolling”—for example, products which have been bevelled or rounded at the edges. \* \* \*  
[Only those products whose nonrectangular cross-sections are achieved subsequent to the rolling process are included within the scope of the investigations.]

*Id.* at 37,069 (emphasis added).

Appendix I also described the scope orders as including:

hot-rolled carbon steel *universal mill plates* (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 millimeters but not exceeding 1,250 millimeters and of a thickness of not less than 4 millimeters, not in coils and *without patterns in relief*), of rectangular shape, neither clad, plated nor coated with metal, whether or not painted, varnished, or coated with plastics or other nonmetallic substances; and certain hot-rolled carbon steel flat-rolled products in straight lengths, of rectangular shape, hot rolled, neither clad, plated, nor coated with metal, whether or not

painted, varnished, or coated with plastics or other nonmetallic substances, 4.75 millimeters or more in thickness and of a width which exceeds 150 millimeters and measures at least twice the thickness \* \* \*.

*Id.* at 37,064 (emphases added).

On August 18, 1993, the ITC concluded that there was material injury or a threat of material injury to domestic industries because imports of certain flat-rolled carbon steel products were subsidized by foreign governments or sold in the United States at less than fair value.<sup>8</sup> The ITC incorporated by reference the scope provided in Commerce's 1993 final antidumping and countervailing duty orders. *ITC Determination* at 43,905 n.2. In August 1993, the ITC also published a report of its investigations where it specifically included within the scope of the investigations "plate the nonrectangular cross section of which was formed by working the plate following the hot-rolling process (beveling or rounding the edges of the plate, for example)."<sup>9</sup>

On October 7, 1999, Duferco "request[ed] [Commerce] to issue a scope ruling confirming that the [Cut-to-Length Carbon Steel Plate From Belgium] orders do not include hot-rolled floor plate, which has a non-rectangular cross-section imparted during the rolling process."<sup>10</sup> The focus of the present proceedings was on whether Duferco's carbon steel plate with patterns in relief (floor plate) was within the scope of the orders. "Patterns in relief" describe a surface pattern containing "raised figures at regular intervals," which provide a skid-resistant surface for floors and was alleged to render the cross section nonrectangular. On November 22, 1999, Commerce issued its final scope ruling, which is the order currently under review in this court.<sup>11</sup>

In the *Final Scope Ruling*, Commerce concluded that the disputed items were within the 1993 final orders. However, Commerce pointed to no language in the 1993 final orders that included floor plate with patterns in relief. Commerce concluded that "the original scope definition proposed by the petitioners and supported with the corresponding HTSUS definition remains *dispositive* for the purposes of the product in question because, as explained, the existence of patterns in relief was understood as not altering rectangularity." *Final Scope Ruling* at 10 (emphasis added). The "original scope definition" was "dispositive" because the 1993 final orders "did not specify any exclusions relating to patterns in relief," *id.*, and "[t]he lack of exclusionary language regarding patterns in relief (such as those found on floor plate) \* \* \* demon-

<sup>8</sup> See *Certain Flat-Rolled Carbon Steel Products From Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, 58 Fed. Reg. 43,905 (Aug. 18, 1993) ("ITC Determination").

<sup>9</sup> *Certain Flat-Rolled Carbon Steel Products From Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom*, ITC Pub. 2664, at 1-18 (Aug. 1993).

<sup>10</sup> Letter from Walter J. Spak and Vincent Bowen, Counsel to Duferco Steel, Inc., to William M. Daley, Secretary of Commerce, at 1 (Oct. 7, 1999) (emphasis in original).

<sup>11</sup> *Final Scope Ruling—Antidumping and Countervailing Duty Orders on cut-to-length carbon steel plate from Belgium*, U.S. Department of Commerce Memorandum from Barbara E. Tillman, Director, Office 7, to Joseph A. Spetrini, Deputy Assistant Secretary, Enforcement Group III (Nov. 22, 1999) ("Final Scope Ruling").



strates [Commerce's] intention to include plate with a textured surface," *id.* at 10–11. Commerce identified three factors that supported its conclusion: (1) the original petition made reference to the HTSUS definition, which included flat-rolled products with patterns in relief derived directly from rolling; (2) there was a lack of protest to inclusion of "whether checkered or not" in the proposed product matching criteria; and (3) unlike universal mill plates with patterns in relief, which were explicitly excluded from the scope of the 1993 orders, there was a "lack of exclusionary language regarding patterns in relief" for carbon steel flat-rolled products in the 1993 orders. *Id.*

Subsequently, before the Court of International Trade, Duferco moved for judgment on the agency record under rule 56.2. *Duferco Steel*, 146 F. Supp. 2d at 916. To address this motion, that court summarized and agreed with Commerce's final scope ruling. *Id.* at 919. The court agreed with Commerce's approach of determining the scope of an anti-dumping or countervailing duty order by "first consider[ing] whether the underlying petitions cover the product." *Id.* at 921. The court concluded that "Commerce reasonably relied upon [the first] two of the three factors cited as support for its conclusion that floor plate is within the scope of the 1993 [antidumping] and [countervailing duty] orders." *Id.* at 926. The court found "unreasonabl[e]" Commerce's reliance on the third factor relating to the specific exclusion for universal mill plates because the parenthetical reference to "without patterns in relief" following the modifier "i.e." in the 1993 final orders only defined universal mill plates, rather than "specifically defining the type of universal mill plate to be included in the scope of investigation." *Id.* In sum, the court upheld Commerce's 1999 final scope ruling because it was "supported by substantial evidence and otherwise in accordance with law." *Id.* This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

## DISCUSSION

### I

We have reviewed scope orders on a number of occasions, and the general rules are well established. We grant significant deference to Commerce's own interpretation of those orders. *Ericsson GE Mobile Communications, Inc. v. United States*, 60 F.3d 778, 782 (Fed. Cir. 1995). "However, Commerce cannot 'interpret' an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001).

### II

This case presents an issue of first impression—whether the scope orders can be interpreted to cover subject merchandise even if there is no language in the orders that includes or can be reasonably interpreted to include the merchandise.

The pertinent language of Appendix I, which is referenced in the orders, is as follows:

Included in these investigations are *flat-rolled products of nonrectangular cross-section where such cross-section is achieved subsequent to the rolling process (i.e., products which have been ‘worked after rolling’)*—for example, products which have been bevelled or rounded at the edges.

*Final Argentine Determination*, 58 Fed. Reg. at 37,064 (emphasis added).

*[O]nly those products whose nonrectangular cross-sections are achieved subsequent to the rolling process are included within the scope of the investigations.*

*Id.* at 37,069.<sup>12</sup> This language cannot reasonably be interpreted to include floor plate with patterns in relief achieved during the rolling process because the patterns in relief render the cross section nonrectangular. Commerce appears to concede that steel with patterns in relief has a nonrectangular cross section according to the mathematical definition of that term; that “the pattern[s] in relief rendered the product somewhat non-rectangular;” and that patterns in relief were not the result of activities “subsequent to the rolling process.”<sup>13</sup> At oral argument, Commerce admitted that “there [was] not specific language” in the 1993 final orders that supported Commerce’s 1999 final scope ruling. Rather, in the 1999 final scope ruling under review here, Commerce, *inter alia*, relied on the fact that the petitions originally included these products through their reference to Note 1(k), and the fact that there is no language in the orders specifically excluding these products. In this court, Commerce argues that “[i]nasmuch as floor plate was included in the [antidumping] and [countervailing duty] investigations, it also had to be included in the ensuing determinations and orders.” Commerce’s Br. at 26.

The Court of International Trade described the interpretive process that should be followed by Commerce as follows:

In determining whether a particular product is within the scope of an [antidumping] or [countervailing duty] order, Commerce must first consider whether the underlying petitions cover the product. See 19 C.F.R. § 351.225(d) & (k)(1) (2000); see also *Eckstrom Industries v. United States*, 27 F. Supp. 2d 217, 222 (Ct. Int’l Trade 1998) (“19 C.F.R. § 351.225(k)(1) requires Commerce to first consider the

<sup>12</sup> The 1993 final orders did not adopt the terminology of Note 1(k).

We note that the language of Appendix I was also involved in the orders under review in *Novosteel SA v. United States*, 284 F.3d 1261, 1265 (Fed. Cir. 2002), and in *Novosteel* we looked to Note 1(k) to define “flat-rolled,” *id.* at 1271. However, in light of the fact that both parties agreed as to the general reach of the scope orders and the applicability of the Note 1(k) approach to that issue, we applied the definition set forth in Note 1(k) without deciding whether it was appropriate to use this reference to define the disputed term in the scope orders. *Id.* *Novosteel* did not involve the “patterns in relief” language involved here.

<sup>13</sup> In its brief submitted to this court, Commerce concedes that the term “rectangular” “means something less than the strict mathematical understanding of ‘rectangular.’” Commerce’s Br. at 18 (citations omitted). Moreover, Commerce admits that Duferco’s product did not satisfy the strict mathematical definition of rectangularity, stating that “a plate with a pattern in relief, such as Duferco’s floor plate, was clearly covered by the petitions as a *rolled product of solid rectangular (other than square) cross section* even if the pattern in relief rendered the product *somewhat non-rectangular.*” *Id.* at 30 (third emphasis added).

petition.”). If the petitions are ambiguous, Commerce must examine the preliminary and final determinations, prior notices of initiation, and any available ITC publications. See 19 C.F.R. § 351.225(d) & (k)(1); see also *Koyo Seiko Co. v. United States*, 834 F. Supp. 1401, 1403–04 (Ct. Int’l Trade 1993). If the scope of the particular product is still unclear, Commerce must look to other criteria, including an analysis of the so-called *Diversified Products* criteria. See 19 C.F.R. § 351.225(k). See also *Diversified Products Corp. v. United States*, 572 F. Supp. 883, 889 (Ct. Int’l Trade 1983).

*Duferco*, 146 F. Supp. 2d at 921–22. Similarly, the court stated that “once Commerce determined that the scope of the original petitions included products with patterns raised in relief within the spectrum of products possessing a rectangular cross-section, this scope carries over to each subsequent stage of the proceedings, absent explicit exclusionary language.” *Id.* at 923 (citing *Royal Bus. Machs., Inc. v. United States*, 507 F. Supp. 1007, 1014 (Ct. Int’l Trade 1980)).

We think that the Court of International Trade’s description of this interpretive process has it exactly backwards. The critical question is not whether the petition covered the merchandise or whether it was at some point within the scope of the investigation. The purpose of the petition is to propose an investigation. See generally 19 U.S.C. §§ 1671a(b)(1), 1673a(b)(1) (2000). A purpose of the investigation is to determine what merchandise should be included in the final order. Commerce’s final determination reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order. See generally *id.* §§ 1671d(a)(1), 1673d(a)(1). Thus, the question is whether the 1993 final scope orders included the subject merchandise. See *Smith Corona Corp. v. United States*, 915 F.2d 683, 685 (Fed. Cir. 1990) (“The class or kind of merchandise encompassed by a final antidumping order is determined by the order \* \* \*”).

In *FAG Italia S.p.A. v. United States*, 291 F.3d 806 (Fed. Cir. 2002), we recently concluded that the absence of a statutory prohibition could not be a source of Commerce’s authority in antidumping cases. Just as Commerce cannot find authority based on the statute’s failure to deny authority, *id.* at 816, so too we conclude that Commerce cannot find authority in an order based on the theory that the order does not deny authority.

To be sure, as we recently recognized in *Novosteel*, 284 F.3d at 1271, scope orders must necessarily be written in general terms, 19 C.F.R. § 351.225(a) (2001), and the “Commerce Department enjoys substantial freedom to interpret and clarify its antidumping orders,” *Novosteel*, 284 F.3d at 1269 (quoting *Ericsson*, 60 F.3d at 782), in accordance with

the methodology set forth in its regulation, 19 C.F.R. § 351.225(k).<sup>14</sup> Scope orders are “interpreted with the aid of the antidumping petition, the factual findings and legal conclusions adduced from the administrative investigations, and the preliminary order.” *Smith Corona*, 915 F.2d at 685. Thus, review of the petition and the investigation may provide valuable guidance as to the interpretation of the final order. But they cannot substitute for language in the order itself. It is the responsibility of the agency, not those who initiated the proceedings, to determine the scope of the final orders.<sup>15</sup> Thus, a predicate for the interpretive process is language in the order that is subject to interpretation. *See, e.g., Ericsson*, 60 F.3d at 782. There is no claim in the 1999 final scope ruling that language in the 1993 final orders themselves can be interpreted to include the products.

Repeatedly, decisions of this court confirm that “[a]lthough the scope of a final order may be clarified, it can not be changed in a way contrary to its terms.” *Smith Corona*, 915 F.2d at 686; *see also Eckstrom*, 254 F.3d at 1072. We have also noted Commerce’s “inability to interpret orders contrary to their terms \* \* \*.” *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998). Thus, for example, in *Ericsson*, we addressed whether Commerce reasonably interpreted or impermissibly modified an order. The original antidumping order provided an exclusion for cellular mobile telephone (“CMT”) subassemblies that were “specifically designed for use in CMTs, and could not be used, absent alteration, in a non-CMT device.” *Ericsson*, 60 F.3d at 780 (quoting *Cellular Mobile Telephones and Subassemblies from Japan; Final Determination of Sales at Less Than Fair Value*, 50 Fed. Reg. 45,447, 45,448 (Oct. 31, 1985)). After reviewing the antidumping order and the corresponding scope ruling, we concluded that Commerce’s attempt to clarify the order actually impermissibly modified it, and accordingly found that the Court of International Trade appropriately vacated the scope ruling. *Ericsson*, 60 F.3d at 782.

In *Eckstrom*, 254 F.3d at 1070, we again recognized the importance of the language of the final scope order in defining the merchandise subject to the order. Although we interpreted the scope of the order in light of the petitions and investigations, the cornerstone of our analysis still rested on the language of the order. *Id.* at 1072. We held that we could not give the order the broad interpretation urged by the government be-

<sup>14</sup> 19 C.F.R. § 351.225(k) explains the interpretive process. The regulation provides, in pertinent part, that: in considering whether a particular product is included within the scope of an order \* \* \*, the Secretary will take into account the following:

(1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.

19 C.F.R. § 351.225(k)(1) (2001).

Subsection (k)(2) of the regulation provides that if the criteria set forth in subsection (k)(1) are not dispositive, Commerce will consider the so-called *Diversified Products* factors to determine the scope of the order. Those factors were first articulated in *Diversified Products Corp. v. United States*, 572 F. Supp. 883 (Ct. Int’l Trade 1983) and include: “(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed.” 19 C.F.R. § 351.225(k)(2) (2001).

<sup>15</sup> In its brief to this court, Commerce concedes that “it is the responsibility of Commerce to determine the proper scope of the investigation and of the antidumping order, not of the complainant before Commerce.” Commerce’s Br. at 39 (citing *Mitsubishi Elec. Corp. v. United States*, 898 F.2d 1577, 1582–83 (Fed. Cir. 1990)).

cause such a broad construction was “belied by the terms of the Order itself.” *Id.* at 1073. Accordingly, we reversed Commerce’s scope determination as not supported by substantial evidence. *Id.* at 1076.

So too the very existence of section 1677j of Title 19 emphasizes the general requirement of defining the scope of antidumping and countervailing duty orders by the actual language of the orders. That section prevents the circumvention of antidumping and countervailing duty orders by including within the scope of the orders products that have been altered in minor ways so as to remove them from the literal scope of the orders. 19 U.S.C. § 1677j(c) (2000); *Wheatland*, 161 F.3d at 1371. Significantly, Congress made no provision for bringing other merchandise within the scope of antidumping and countervailing duty orders that was otherwise outside the language of those orders. We are compelled to conclude that in other respects Congress intended the language of the orders to govern.

In sum, when Commerce concluded that appellant’s products were within the scope of the 1993 final orders, it impermissibly modified the orders to include products that were not within the scope of the original 1993 final orders.

#### CONCLUSION

For all these reasons, we hold that Commerce’s 1999 final scope ruling, interpreting its 1993 final scope orders to include imported floor plate “with patterns in relief derived directly from the rolling process,” is invalid. We accordingly reverse the decision of the Court of International Trade.

#### COSTS

No costs.

#### REVERSED